

After reviewing the record compiled to date, the Appeals Board finds:

(1) Claimant was the only witness to testify at the February 4, 1999 preliminary hearing.<sup>1</sup>

(2) Claimant described his job with respondent as a concrete worker primarily for the construction of basements. This involved lifting forms weighing approximately 75 to 100 pounds each and pouring cement.

(3) Claimant had worked for respondent for approximately two years when, on October 27, 1998 he injured his low back. Claimant was throwing forms off the form truck down into the basement hole when he tripped and fell from the truck, landing on his rear. This fall was witnessed by a coworker named Matt who was also the son-in-law of Ben Schreiner, the respondent company's owner. Claimant's supervisor, John Artzer, was at the job site but claimant does not know whether Mr. Artzer witnessed the accident or ever became aware of the accident.

(4) Claimant did not think he was badly hurt and continued working, but with pain, until November 18, 1998.

(5) Claimant did not request medical treatment from his employer and did not seek medical treatment on his own until Sunday, November 15, 1998 when he went to the emergency room at St. Francis Hospital. Claimant described being at home, sitting at the dinner table, when his back pain became intolerable and he began having difficulty breathing. He went to the hospital emergency room where he related his symptoms to the incident at work when he fell off the truck. Claimant was released with a prescription for pain medication and work restrictions. However, claimant returned to his regular duties and worked Monday and Tuesday, November 16 and 17, without filling the prescription or advising his employer of his restrictions.

(6) On Wednesday, November 18, claimant did not go to work. Because it looked like it was going to rain and his wife had a doctor's appointment in Lawrence and because claimant had a prescription to fill from his November 15 visit to the emergency room, claimant did not report to work and did not call in. Later that day he received a call from respondent's office manager, Tom Tenbrink. As a result of that conversation claimant was laid off. Claimant went to the office that afternoon and spoke to Cheryl and Ben Schreiner. At that conference claimant reported his back injury for the first time. Claimant could not recall the exact day that he fell from the truck and so Matt was brought in. Matt confirmed that he witnessed the accident and it was determined that the accident date was October 27. Claimant then presented respondent with his work restrictions from St. Francis Hospital.

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<sup>1</sup> The testimony of Cheryl Schreiner regarding the posting of a form 40 on the office bulletin board was introduced by affidavit.

**CONCLUSIONS OF LAW**

The Appeals Board finds claimant suffered a single accident on October 27, 1998. The evidence fails to establish that his back injury was aggravated by his work activity after that date. As claimant did not report his accident until November 18, 1998, he failed to give notice within 10 days. Claimant argues there is just cause for his failure to give 10 days notice because he did not know of the 10-day notice reporting requirement and he thought his condition would get better. In addition, even though claimant alleges he was unaware that he had to give notice within 10 days, because respondent is a family owned business and his accident was witnessed by the owner's son-in-law, claimant now alleges he assumed this was notice to respondent. Respondent counters that claimant knew the son-in-law was a concrete worker like himself and that notice to a coworker is not notice to the employer. Respondent maintains it had met its legal obligation by posting the form 40 in a room that claimant visited on a daily basis. Finally, respondent contends that claimant's allegation he was hoping that he would get better is not supported by the evidence and furthermore is insufficient to constitute just cause.

The Appeals Board agrees that notice to Matt is not notice to the employer. There is no evidence that Matt had an ownership interest in the company or was anything other than a coworker. Even accepting claimant's testimony that he was unaware of the 10-day reporting requirement, standing alone, this does not constitute just cause where the employer has posted the required form 40. The Appeals Board agrees with claimant that it would have been better had respondent somehow specifically apprised claimant of his duty to timely report accidents but this is not a legal requirement.

This brings us to claimant's primary assertion which is that the reason he did not report his accident was that he believed his condition would get better coupled with an ignorance of any requirement to timely report accidents. This presents a very close question that rests in part upon claimant's credibility. Claimant testified that he was able to continue to perform his regular job duties including lifting forms weighing 75 to 100 pounds. But, this caused him pain and he had worse pain evenings at home. There is no evidence that his symptoms were improving. To the contrary, claimant argues an each and every day aggravation of his injury. Obviously his condition became worse on November 15 when he reported to the hospital emergency room. Despite this, claimant still did not report the injury to his employer until after he was laid off. Whatever belief claimant harbored that his back injury was a minor and temporary condition that would go away without medical treatment certainly was gone by November 15. This was more than 10 days after the accident but the fact that claimant still did not see a need to report his injury or inform his employer of his work restrictions during the next two working days after going to the emergency room contradicts claimant's assertion that he earlier chose not to give notice of accident because he thought the injury would go away. For these reasons, the Appeals Board agrees with the ALJ's conclusion that claimant has not established just cause for his failure to give notice within 10 days.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order Denying Compensation entered by Administrative Law Judge Brad E. Avery on February 5, 1999, should be, and the same is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 1999.

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BOARD MEMBER

c: Cynthia J. Patton, Topeka, KS  
Bret C. Owen, Topeka, KS  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Director